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6 STEVEN SERNA, AV6671,
7 Petitioner,
8 v.
9 PATRICK COVELLO, Warden,
10 Respondent.

Case No. [19-cv-02618-CRB](#) (PR)

**ORDER GRANTING MOTION FOR
STAY AND ADMINISTRATIVELY
CLOSING CASE**

(ECF No. 65)

I.

Petitioner, a state prisoner incarcerated at Mule Creek State Prison (MCSP), has filed a pro se motion for a stay under Rhines v. Weber, 544 U.S. 269 (2005), to allow him to exhaust two new claims of ineffective assistance of trial and appellate counsel. For the reasons set forth below, the motion will be granted.

II.

Petitioner was convicted by a jury in Contra Costa County Superior Court of perpetrating various sex crimes against his 10-year-old daughter in three separate incidents during the summer of 2012. On December 19, 2014, he was sentenced to an indeterminate term of 25 years to life in state prison. Petitioner unsuccessfully appealed his conviction to the California Court of Appeal and the Supreme Court of California, which on February 14, 2018 denied review.

On May 6, 2019, petitioner filed a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254 challenging his state conviction on two grounds: (1) the trial court's admission of his daughter's out-of-court statements violated his federal constitutional rights to confront and cross-examine witnesses and to present a complete defense; and (2) ineffective assistance of trial counsel for not impeaching a key witness or calling petitioner's mother to testify, presenting the inconsistent and weak defense that petitioner had erectile dysfunction, and not fully cross-examining petitioner's daughter at trial.

1 On September 18, 2019, the court found that the petition appeared to state cognizable
2 claims for relief under § 2254, when liberally construed, and ordered respondent to show cause
3 why a writ of habeas corpus should not be granted. Respondent filed an answer to the order to
4 show cause on November 18, 2019 and petitioner filed a traverse on February 3, 2020.

5 On March 2, 2020, petitioner filed a request to stay his petition under Rhines to exhaust
6 new claims in state court. Because the request did not specify what new claims petitioner was
7 seeking to exhaust in the state courts or explain why he did not exhaust them earlier, the court
8 denied it “without prejudice to petitioner filing a motion if he can show (1) ‘good cause’ for his
9 failure to exhaust in state court, (2) that his unexhausted claims are not ‘plainly meritless,’ and (3)
10 that he has not engaged in ‘intentionally dilatory litigation tactics.’” Mar. 11, 2020 Order (ECF
11 No. 32) at 1 (quoting Rhines, 544 U.S. at 278).

12 On July 21, 2020, the court noted that petitioner had not filed a motion for a stay “despite
13 being given time to do so” and proceeded to review the claims in the submitted petition. July 21,
14 2020 Order (ECF No. 33) at 1. The court denied the petition on the merits and denied a certificate
15 of appealability. Id. at 21. It also entered judgment. July 21, 2020 J. (ECF No. 34).

16 On September 10, 2020, petitioner filed a notice of appeal and a motion for reconsideration
17 arguing that the court improperly had denied him “the opportunity to exhaust” new claims “related
18 to his incompetency to stand trial” and to “amend his federal habeas petition” to add these claims.
19 Mot. (ECF No. 36) at 2. The court directed respondent to file a response to the motion for
20 reconsideration and, on October 13, 2020, respondent filed an opposition to the motion. Petitioner
21 then sought several extensions of time to file a reply until he finally did so on April 5, 2021.

22 On May 28, 2021, the court noted that petitioner’s reply set forth “new claims and
23 arguments in support of reconsideration not raised in his September 10, 2020 motion for
24 reconsideration” and dismissed the motion for reconsideration “without prejudice to his filing,
25 within 60 days of this order, a new motion for reconsideration/motion to vacate judgment
26 containing all claims and arguments on which he believes he is entitled to relief from the final
judgment entered on July 21, 2020.” May 28, 2021 Order (ECF No. 53) at 2.

27 On September 30, 2021, petitioner filed a new motion for reconsideration and/or relief
28 from judgment pursuant to Federal Rule of Civil Procedure 60(b) asking the court to vacate its

1 July 21, 2020 judgment to allow him: (1) to seek a stay under Rhines to exhaust new federal
2 claims in state court and to amend his petition to add the new claims once exhausted, and (2) to
3 timely appeal the July 21, 2020 denial of the claims in his petition. The court granted the motion
4 “to allow petitioner to seek a stay to exhaust new federal claims in state court” and instructed the
5 clerk to vacate the judgment entered on July 21, 2020. Apr. 22, 2022 Order (ECF No. 61) at 4.

6 On August 10, 2022, petitioner filed a new motion for a stay under Rhines and a request
7 for appointment of counsel. He also filed a proposed first amended petition (FAP) alleging the two
8 claims raised in the original petition (claims 1 and 2) and six additional new claims (claims 3 thru
9 8). Claim 3 alleges a due process violation by the trial court’s refusal to hold a hearing regarding
10 petitioner’s daughter’s competence to testify; claim 4 alleges misconduct by support people
11 present at trial denied petitioner a fair trial; claim 5 alleges insufficient evidence supports counts
12 one, and three thru seven; claim 6 alleges a denial of due process from a biased judge who
13 presided over the motion for a new trial; claim 7 alleges ineffective assistance of trial counsel for
14 failing to develop evidence of petitioner’s severe mental disorders proving that he lacked the
15 necessary mental state for any of the charges; and claim 8 alleges that trial and appellate counsel
16 both had irreconcilable conflicts of interest (trial counsel was biased against defendants who were
17 charged with sex crimes against children and appellate counsel represented petitioner on both the
18 motion for a new trial and appeal) that resulted in depriving petitioner of effective assistance of
19 counsel at both trial and appeal. See ECF No. 66-1 at 6-18. Petitioner submits that claims 3 thru 6
20 were exhausted on direct appeal but that claims 7 and 8 are based on newly discovered evidence
21 and unexhausted. Petitioner specifically seeks a stay under Rhines to exhaust claims 7 and 8.
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III.

23 A district court may stay a federal petition that includes both exhausted and unexhausted
24 claims to allow the petitioner to exhaust in state court. See Rhines, 544 U.S. at 277-78. But the
25 petitioner must show (1) “good cause” for his failure to exhaust in state court, (2) that his
26 unexhausted claims are not “plainly meritless,” and (3) that he has not engaged in “intentionally
27 dilatory tactics.” Id. at 278. “Good cause” in the context of a Rhines stay turns on whether the
28 petitioner can set forth a reasonable excuse supported by sufficient evidence to justify the failure

1 to exhaust. Blake v. Baker, 745 F.3d 977, 982 (9th Cir. 2014); see also Pace v. DiGuglielmo, 544
2 U.S. 408, 416- 417 (2005) (reasonable confusion regarding timeliness of state filing ordinarily
3 constitutes good cause under Rhines).

4 The court is satisfied that petitioner has made a sufficient showing for a Rhines stay under
5 the circumstances. Although petitioner's two new claims of ineffective assistance of trial and
6 appellate counsel (claims 7 and 8) will require him to go beyond the current pleadings to prove
7 prejudice to obtain relief, neither claim is plainly meritless; petitioner has not engaged in
8 intentional dilatory litigation tactics; and petitioner's documented history of mental illness (see
9 ECF Nos. 22 & 58) and claim of ineffective assistance of counsel for failing to develop a mental
10 illness defense constitute good cause under Rhines. See Blake, 745 F.3d at 982-84 (reversing
11 denial of stay when petitioner supported his good cause argument of postconviction ineffective
12 assistance of counsel with evidence that counsel failed to discover, investigate, and present to state
13 courts readily available evidence of petitioner's abusive upbringing and compromised mental
14 condition). In fact, petitioner's documented prior but unsuccessful attempts to exhaust the new
15 claims during the pendency of this federal action without the assistance of counsel (see ECF No.
16 50 Exs. P, R, S & T) further support a finding of good cause under Rhines in this case. See Dixon
17 v. Baker, 847 F.3d 714, 721-22 (9th Cir. 2017) (lack of counsel during state post-conviction
18 proceedings qualifies as "good cause" under Rhines). Accordingly, a stay under Rhines will issue
19 to allow petitioner to exhaust claims 7 and 8.

20 **IV.**

21 In addition to a stay under Rhines to exhaust claims 7 and 8, petitioner seeks leave to file
22 the proposed FAP to add exhausted new claims 3 thru 6, and unexhausted new claims 7 and 8.
23 The request is denied without prejudice to renewing it after petitioner exhausts claims 7 and 8 in
24 the state courts and moves to reopen this case and lift the court's stay, if needed.

25 Petitioner is advised that although the court agrees that claims 3 thru 6 were exhausted on
26 direct appeal this does not mean that they are timely because they necessarily relate back to the
27 date the original petition was filed. An amendment made after AEDPA's one-year statute of
28 limitation has run relates back to the date of the original pleading if the amendment "asserts one or

more claims that arise out of ‘the conduct, transaction, or occurrence’ that the original petition “set out” or “attempted to . . . set out.” Ross v. Williams, 950 F.3d 1160, 1167 (9th Cir. 2020) (en banc) (quoting Fed. R. Civ. P. 15(c)(1)(B)). An amended petition “does not relate back (and thereby escape AEDPA’s one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth.” Mayle v. Felix, 545 U.S. 644, 650 (2005) (finding that new coerced confession claim did not relate back to original petition that raised only factually distinct Confrontation Clause claim). Only if the original and amended petitions state claims that are tied to a common core of operative facts will relation back be in order. Id. at 664.

Petitioner is further advised that if his new claims are time-barred by the relevant limitation period, he will bear the burden of showing that he is entitled to equitable tolling. Specifically, he will have to show “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” Holland v. Florida, 560 U.S. 631, 649 (2010) (citation and internal quotation marks omitted).

V.

Petitioner’s renewed request for appointment of counsel is denied without prejudice. See Knaubert v. Goldsmith, 791 F.2d 722, 728 (9th Cir. 1986) (unless an evidentiary hearing is required, the decision to appoint counsel in habeas corpus proceedings is within the discretion of the district court). Petitioner clearly presented his claims for relief in the original petition and the proposed FAP and has continued to ably advocate for himself and his positions (albeit with the assistance of a fellow prisoner) throughout these proceedings. Accord Bashor v. Risley, 730 F.2d 1228, 1234 (9th Cir. 1984) (although petitioner had no background in law, denial of appointment of counsel within discretion of district court where petitioner clearly presented issues in petition and accompanying memorandum). The court will appoint counsel on its own motion if an evidentiary hearing is later required. See Knaubert, 791 F.2d at 728 (appointment of counsel mandatory if evidentiary hearing is required).

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1 VI.
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For the foregoing reasons, petitioner's motion (ECF No. 65) for a stay under Rhines to
exhaust new claims 7 and 8 is GRANTED. The clerk is instructed to ADMINISTRATIVELY
CLOSE the case. Nothing further will take place in this matter until petitioner exhausts his new
claims 7 and 8 in the state courts and, within 28 days thereafter, moves to reopen the case and
lift's the court's stay.

7 **IT IS SO ORDERED.**
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Dated: November 28, 2022

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CHARLES R. BREYER
United States District Judge